IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS & CLARK.

JB 16 p. 270

TEAMSTER LOCAL NO. 45, affiliated with International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America,. Inc.,

Petitioner,

vs.

STATE OF MONTANA ex rel BOARD OF PERSONNEL APPEALS and STUART McCARVEL,

Respondents.

No. 50170

INDEXED ULP 24-77

OPINION AND ORDER

The Union seeks judicial review of a December 22, 1983 Board decision that it had committed an unfair labor practice against McCarvel, one of its members, and that it must provide certain remedies. After briefing and argument, the matter was submitted April 2, 1985.

Procedural Background

August 8, 1977, McCarvel filed an unfair labor practice charge against the Union with the Board. He charged the Union with breaching its duty to fairly represent him by failing to prosecute his grievance against his employer, the City of Great Falls. Following a full fact-finding hearing, the Board's examiner entered findings of fact, conclusions of law and a recommended order on November 30, 1978. Because the parties agreed to bifurcate the liability and remedy

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CLARA GLREATH
CLERK OF DISTRICT COURT
BY Joan Yuhas

issues, the examiner limited her consideration. She found the Union failed to fairly represent McCarvel by its failure to accept and process his grievance, thereby restraining him in the exercise of his rights guaranteed under 39-31-201, which constituted an unfair labor practice under 39-31-402(1).

February 22, 1979, the Board affirmed the examiner and ordered an additional hearing to determine remedies. Prior to this hearing, however, the Union filed a motion to dismiss the charges before the Board, claiming it had no jurisdiction to decide the case. The Board refused to dismiss the charge and the Union appealed that ruling to this Court. District Judge Peter Meloy held the Board lacked jurisdiction and dismissed the case. The Board appealed and the Supreme Court reversed. Teamsters Local 45 v. State ex rel Board of Personnel Appeals, 635 P.2d 1310 (Mont. 1981). Judge Meloy thereupon remanded the matter to the Board for a hearing on remedies. After that hearing, the examiner entered proposed findings and conclusions and recommended McCarvel be awarded $8,353.17. The Board issued its decision December 16, 1983, adopting the examiner's findings and ordering the union to pay lesser damages of $7,540.00 in accordance with the apportionment scheme approved in Bowen v. U. S. Postal Service, 45 U.S. 212 (1983). The Union filed for judicial review on January 16, 1984. Because the prior district court action on this matter involved consideration of the issue of jurisdiction only, we review the Board's earlier unfair labor practice decision as well as its more recent decision on remedies.

Factual Background

McCarvel was hired as a bookmobile driver for the City of Great Falls February 17, 1976. He performed some clerical work in addition to driving of the bookmobile and worked a 40-hour week. He was represented by the Union for collective bargaining purposes. Upon receipt of his first pay check on March 5, 1976, McCarvel discovered he was paid for only 20 hours a week at the rate specified in the collective bargaining agreement and that he was not being paid time an a half for overtime. The other 20 hours was paid at a lesser clerk's rate of pay. He repeatedly requested the Union to file a grievance on his behalf from March, 1976, to March, 1977. The Union consistently refused to do so, stating it would not be successful because the Union and the City had a long-standing oral agreement that the drivers would be paid half-time as drivers at union scale and half time as clerks at the clerk's rate. It also refused on the grounds that the problem would be taken care of at the bargaining table and that pressing the grievance would upset pending contract negotiations. The business agent finally agreed to try to resolve McCarvel's claims during the bargaining in the summer of 1977. The City, however, told him the matter was a contract grievance and should be handled under the contract grievance procedures. The Union finally agreed to file the grievance on August 8, 1977, the same day McCarvel filed the present unfair labor practice charge against it. Nothing was ever resolved by the grievance procedure, due to a deadlock on the grievance panel. McCarvel resigned from his job on June 30, 1978.

Standards of Review

The Administrative Procedure Act applies to the Board and its actions (39-31-104, 2-4-701, 2-4-102(2) and 2-3-102) and under that act we may reverse or modify the Board's decision where either t findings of fact are "clearly erroneous in view of the reliable, probative and substantive evidence on the whole record" (2-4-704(2)(e or the conclusions of law violate or are in excess of the statutory authority (2-4-704(2)(a) and (b)) or the action of the agency is arbitrary,capricious or characterized by an abuse of discretion (2-4-704(2)(f). We may thus conclude, I believe, that in cases such this we have three critical criteria. In considering whether a finding of fact should be sustained, we ask if it is supported by "substantial evidence." In considering whether a conclusion of law should be sustained we ask if it is contrary to law. We may also ask if the agency action is arbitrary, capricious or unreasonable. W interpret the Montana statutes applying to collective bargaining for public employees (39-31-101 et. seq.) in accordance with the decisions of The National Labor Relations Board (NLRB) and the federal courts construing provisions of The National Labor Relations Act (NLRA). Teamsters Local 45 v. State Board of Personnel Appeals, 635 P.2d 1310, 1312, 195 M 272 (1981).

Factual Issue

The only factual question raised by the Union is whether it was presented with evidence of overtime worked by McCarvel to support his claim for overtime pay. It contends the Board was erroneous in

finding McCarvel presented it with records to support his claim for overtime. It argues that because McCarvel never gave his overtime records to its business agent it had insufficient factual basis to support a grievance. The record supports the Board's finding.

Finding of Fact No. 10 (1978 hearing) in part reads: "McCarvel offered to show McCormick his time sheet showing he worked overtime b McCormick brushed aside the offer saying he believed him." Certainly this finding is supported by McCarvel's testimony before the hearing examiner:

> HILLEY: Okay. Now, showing, I mean directing your attention to the plaintiff's exhibit one, did you ever give an officer of the Teamsters union a copy of what you have introduced as plaintiff's exhibit one?
>
> S. McCARVEL: Yes. I did go down there.
>
> HILLEY: On what date?
>
> S. McCARVEL: November 19, rough, that's a rough date.
>
> SKAAR: What - what year?
>
> S. McCARVEL: 1976. And I had, I didn't have the complete, of course this thing, it was impossible to have it completed, but I had, you know, the November going in there all the way up to the 19th when I went in there, at that time with me. And he said he didn't need that, he knew what I worked.
>
> J. McCARVEL: Who said?
>
> S. McCARVEL: McCormick.
>
> HILLEY: He knew wher you worked?
>
> S. McCARVEL: Yes, he didn't need that for the purpose of filing a grievance. He knew it, I had the record there. (Emphasis supplied)

Tr. Page 58 Line 11-28.

J. McCARVEL: Now, when you showed McCormick, as you have testified that first 19 days of, 15 days in November, the overtime that you had worked, and you wanted to file a grievance, what did he say to you about that?

S. McCARVEL: He said that, the oral agreement doesn't make any mention of overtime and that, he didn't need to see this. He believed that I was working in excess, working some overtime; and that he would try to get it straightened out in the next contract.

Tr. page 72, lines 16-24.

Though conflict may exist as to whether McCormick asked for, but never received these overtime records, this testimony provides substantial evidence to support the Board's finding that McCarvel was prepared to present the records, but was told they were not necessary. This settles the factual question.

Legal Issue - Unfair Labor Practice

The Board concluded the Union's failure to process McCarvel's claim constituted a breach of its fiduciary duty of fair representation. This breach, it concluded, had the effect of restraining McCarvel's collective bargaining rights, in violation of Section 39-31-201, which is an unfair labor practice as defined in Section 39-31-402(1). The Union disagrees and poses the following legal questions:

(1) Was the Board's finding of arbitrary and unreasonable union conduct by its failure to accept and process the grievance a proper basis for concluding the Union breached its fiduciary duty of fair representation?

(2) Was a finding of union discrimination against the employee essential to a conclusion that the Union breached its duty of fair representation?

(3) Did the Board violate the six month statute of limitations for unfair labor practice charges by considering solely events occurring prior to February 8, 1977, as the basis of the charge?

As to the first question, a union's duty of fair representation is a judicially created doctrine first recognized in the context of the Railway Labor Act in Steele v. Louisville Railroad Co., 323 U.S. 192, 65 S. Ct. 226 (1944). Based on the Act's grant of exclusive representation of the employees, the court interpreted Congressional intent to require a duty to protect the minority members. Thus, Steel required the union to represent its individual members "without hostil discrimination, fairly, impartially and in good faith." Id. at 204,65 S. Ct. at 232. The Steele principle was later extended to bargaining representations under the NLRA, Sykes v. Oil Workers Local 23, 350 U.S 892, 76 S. Ct. 152 (1955). The NLRB first recognized a breach of the duty of fair representation as an unfair labor practice in Miranda Fue Co., 140 NLRB 181,51 LRRM 1584 (1962), reasoning the privilege to act as an exclusive bargaining representative granted in §9 of the NLRA necessarily gives rise to a corresponding §7 right in union constituents to fair representation by the exclusive representative. Although the duty of fair representation arose in the context of racial discrimination, the doctrine has been expanded to include arbitrary conduct by a union toward bargaining unit members. In the case of Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903 (1967), the United States Supreme Court stated the controlling test for breach of the union duty of fair representation: "...a breach of the duty of fair

representation occurs only when a union's conduct...is arbitrary, discriminatory, or in bad faith." Id. at 190, 87 S. Ct. at 916. Thus it is settled under federal labor law and therefore under Montana labor law that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory manner. Id., at 191, 87 S. Ct. at 917.

In her examination of the Union's conduct in this case, the hearing examiner found the only excuses offered McCarvel for the Union's refusal to accept the grievance were: (1) the existence of an oral agreement, (2) the problem would be taken care of at the bargaining table, and (3) pressing the grievance would upset contract negotiations with the city. These excuses were found "clearly specious" because: (1) the oral agreement did not cover overtime and could not be used as an excuse to refuse the grievance, [+] (2) since the contract provided for overtime, failure to award it was a contract violation and requires no further negotiations, and (3) negotiations are only part of the union's duty to its members. Having so found, the hearing examiner concluded the Union's action was arbitrary in that it advanced no substantial reason for its failure to accept the grievance, to make a good faith investigation of it, and to submit it for an organized screening process. Contrary to petitioner's assertion, the hearing examiner did not find mere negligence in the Union's handling of the grievance. Recognizing the business agent's inaction in return-

[+]The hearing examiner also noted that the right of an employee to the minimum wage provided for in the written agreement is an individual right and cannot be taken away by an oral agreement between the employer and a union official. Eversole v. LaCombe, 125 Mont. 87, 231 P.2d 945 (1951) (1978 Findings and Conclusions p. 8)

ing phone calls could be considered passive and consequently negligent conduct, the hearing examiner emphasized "this inaction combined with his subsequent statements to McCarvel indicate an active, intentional avoidance of accepting the grievance." Even unintentional acts or omissions by union officials may be considered arbitrary if they reflect reckless disregard for the rights of individual employees if they severely prejudice the injured employee and if the policies underlying the duty of fair representation would not be served in shielding the union from liability in the particular case. Robesby v. Qantas Empire Airlines Limited, 573 F. 2d, 1082, 1088-1090 (9th Cir. 1978). The more meritorious the grievance the more substantial the reason must be to justify abandoning it. Gregg v. Chauffeurs, Teamsters and Helpers Local, 699 F. 2d1015 (9th Cir. 1983). We can think of few issues more meritorious and important to an employee than the issue of pay. The Board's conclusion that the Union's conduct was so unreasonable and arbitrary as to constitute a breach of the duty of fair representation is firmly supported by the law and the facts.

The Union also contends the Board erred by making no finding related to discrimination, as is required for a conclusion that there has been a breach of the duty of fair representation. No such finding is necessary. Initially the doctrine of fair representation arose in response to open and pervasive discrimination against black workers in railroad unions. Steele v. Louisville and Nashville Railroad, supra. As it evolved, the doctrine was expanded to include arbitrary and bad faith conduct. Vaca v. Sipes, supra. A clear majority of circuit

courts applying the holdings of the Supreme Court do not now require a finding of discrimination, bad faith or hostility on the part of the union to prove breach of the duty of fair representation. DeArroyo v. Sindicato DeTrabajadores Hocking House, AFL-CIO, 425 F. 2d 281 (1st Cir 1970); Robesky v. Qantas Empire Airlines Limited, supra. In this case, no finding as to discrimination was made because none was necessary.

The Union's final fair labor practice argument is that the Board erred in considering only events that occurred more than six months prior to the time the charge against it was filed and that this violated Section 39-31-404, which provides: "No notice of hearing shall be issued based upon any unfair labor practice more than 6 months before the filing of the charge with the board. . ." (The language of the statute is confusing, particularly in its codified setting. The "notice" referred to originally meant a notice of formal hearing given upon the filing of the complaint, no preliminary consideration of the Board being required. [See Section 7, Ch. 441, L. 1973] In 1983 the law was amended [Section 1, Ch. 95, L. 1983] to provide for a preliminary investigation by an agent of the Board and a determination by the Board of "probable merit" before the notice of formal hearing issued. [39-31-405(3)] To avert confusion,the section [39-31-404] should be amended to read: "The Board shall not consider any unfair labor practice alleged to have occurred more than six months before the filing of the charge." That is the meaning we attribute to the statute in the following discussion.)

As noted, McCarvel made his first complaint to the Union upon

receipt of his first pay check on March 5, 1976, and continued to complain until he filed his formal charge against the Union on August 8, 1977. There is no evidence that his complaint was interrupted or alleviated at any time during this period.

The Union argues the section requires that an unfair labor practice charge be filed within six months after the grievance has arisen, and that there is no evidence of any unfair labor practice on the part of the Union within the six month period prior to the filing of the charge on August 8, 1977, i.e., after February 8, 1977. This is simply contrary to the facts as disclosed by the record. The grievance was not a one-time affair that began and ended with McCarvel's request for assistance some seventeen months before he filed his charge. It was a continuing grievance that recurred every day that the Union refused to act. It occurred every day in the six months prior to the day he filed his charge, which also happened to be the day the Union finally took action. The continuing nature of such a violation has been recognized in federal NLRA decisions (See Argulo v. Levy Co., 568 F. Supp. 1209, 114 LRRM 2335 (D.C. Ill. 1983), by which we are guided, as noted above.

The second general question is whether the Board's remedy was within its statutory discretion. The following particular questions are considered:

(1) Did the library policy of giving comp time in place of overtime pay supersede the collective bargaining agreement to pay overtime?

(2) Did the Board err in awarding damages prior February 8, 1977?

(3) Was interest properly calculated using the NLRB standard set forth in Florida Steel?

(4) Were the notice requirements of the Board's order in excess of the Board's authority?

(5) Could McCarvel have initiated an individual claim for wages and overtime in place of relying on his union to process his grievance?

(6) Were damages properly awarded to McCarvel past the date the Union filed his grievance?

Standard of Review

The Board has broad authority to remedy an unfair labor practice. Under Section 39-31-406(4), the Board may order a party to cease and desist from an unfair labor practice and may order affirmati action "as will effectuate the policies of this chapter." In dealing with similar statutory language, the Montana Supreme Court has recognized that if the Board determines the employee is aggrieved, it has full discretion to resolve the employee's grievance. Hutchin v. State of Montana Department of Fish Wildlife and Parks, 688 P.2d 1257 (Mont.1984)interpreting 2-18-1012.

In the case of an unfair labor practice arising from a breach of the duty of fair representation, there is no standard remedy. "The appropriate remedy for a breach of a union's duty of fair representation must vary with the circumstances of the particular case." Vaca v. Sipes, 386 U.S. at 195, 87 S. Ct. 919. Economic injury to the employee has been remedied by requiring the union to pay all wages lost by the employee due to the union's illegal action. Service Employees Local 579 (Convacor of Decatur), 229 NLRB 104, 95 LRRM 1156 (1977). Essentially the union must make the employee whole

Question 1

The Union questions whether the Board's award for overtime is correct considering the library's policy to give comp time in place of overtime pay. The hearing examiner's finding as to the merits of the overtime claim is in no way diminished by the library's policy not to grant overtime but to grant "comp time." An employee who is entitled to overtime both contractually and statutorily cannot be given comp time instead. The library policy cannot supersede state law or a collective bargaining agreement. The award of $678.64 for overtime and interest will not therefore be disturbed.

Question 2

The Union maintains the Board had no authority to award damages for the period prior to February 8, 1977, six months before the charge was filed. While the Board has no jurisdiction to consider claims based solely on practices committed more than six months before the charge is filed (see discussion under fair labor practice, above), once the unfair labor practice is established based on conduct within the six month limitation period the Board appears to have wide discretion in awarding damages to make the employee whole.

The NLRB has not taken a consistent position as to limitations on back pay. In some cases involving employer breach of the collective bargaining agreement, it has limited back pay to six months before the date a charge is filed. See Nelson-Hershfield Electronics, 188 NLRB 26, 77 LRRM 1013 (1971), footnote 2. In other

cases, the court has awarded back pay for the entire time the grievant suffered a loss in wages attributable to the union's failure to process a grievance. IBEW, Local 2088 (Federal Electric Corp.), 218 NLRB 48, 89 LRRM 1590 (1975) and Abilene Sheet Metal Inc. v. NLRB, 619 F.2d 332 (5th Cir. 1980), 104 LRRM 3077.

In this case, it would be manifestly unjust to the grievant to limit back pay to the six months prior to filing the unfair labor practice with the board. To thus limit the award would in effect reward the Union for its procrastination in handling the grievance. The time frames in this case between the alleged grievance arising and the filing of the unfair labor practice for the Union's mishandling of the grievance are similar to those in IBEW, Local 2088, supra. In that case, the grievance was filed in October, 1972 and the unfair labor practice was filed February 8, 1974, soon after the grievant learned his grievance had not been handled with several other identical grievances. There the Board directed the union to pay the back wages for a period extending eight months prior to the filing of the unfair labor practice, thereby paying the grievant the same as the other grievants whose claims the union had processed. Similarly in this case the grievance arose March 5, 1976, when McCarvel received his first pay check and realized he was not being paid the union rate. Through no fault of his own, his grievance was not filed until August 8, 1977. Under the NLRB holding in IBEW, Local 2088, we believe this to be an appropriate circumstance to award damages beyond the six month statute of limitations. Without this award, the employee would

not have been made whole as required by 39-31-406, and unions would be encouraged to procrastinate in their handling of meritorious grievances knowing liability would be limited to six months prior to filing of the charge.

Question 3

The Union contends interest should be calculated according to the statutory rates in Section 25-9-205 rather than the formula set down by the NLRB in Florida Steel Corp. (1977), 231 N.L.R.B. 651, 96 L.R.R.M. (BNA(1070. This matter has been laid to rest by the case of City of Great Falls v. Bruce Young and Mt. Board of Personnel Appeals, 686 P.2d 185 (1984), in which the court held the Florida Steel interest standard applicable to unfair labor cases under Montana law. The statute does not prevent the use of variable interest rates when calculating interest due on back pay awards, but should compliment the legitimate ends of public policy. City of Great Falls, supra, pg. 192. The interest award will therefore not be disturbed.

Question 4

The Union argues the notices ordered by the BPA are in excess of its statutory authority. The order required Local 45 to mail a copy of its notice to "all employees in the bargaining unit of the City of Great Falls." Section 39-31-406 gives the Board Discretion to "take such affirmative action...as will effectuate the policies of this chapter." While an order requiring the posting of notices may be more common, the NLRB has, under identical discretionary language, required mailing of the notices to employees. NLRB v. E. W. Elson Bottling Company, 379 F. 2d 223 (1967).

Given the unique facts of this case, including the egregious behavior of the Union in refusing to file the grievance for more than 17 months, we believe the Board's remedial order requiring the Union to mail the notices is not an abuse of power.

The bargaining unit involved here is a broad, multicraft unit represented by the Public Employees Craft Council. The Union's membership constitutes only a portion of the bargaining unit. Because this unfair labor practice involves only the Teamsters, it is difficult to see how mailing notice of the violation to all the members of the bargaining unit will effectuate the policies of the statute. But the choice of the Board will not be disturbed unless it can be shown that the order is a patent attempt to achieve ends other than whose which can fairly be said to effectuate the policies of the statute. (NLRB v. Electrical Workers, Local 3, ____F.2d____, 115 LRRM 3436 (2nd Cir. 1984). No such showing has been made in this case.

Question 5

The Union contends McCarvel's claim is questionable because he could have initiated an individual claim for wages and overtime through the Montana Department of Labor or directly in district court. It cites us to Freeman v. Teamsters Local 135, ___F.2d___, (7th Cir. 1984) 117 LRRM 183, for the proposition that if a particular form of redress is not relegated to the exclusive domain of the union, an individual is free to seek that avenue. In this case, the collective bargaining agreement is less than specific as to exclusivity of the grievance processing: "the affected employees or his representative and the

immediate supervisor for the city, shall endeavor to adjust the matter We do not read the Freeman case to mean an individual employee loses his grievance rights under a collective bargaining agreement when the agreement also permits his independent action. To follow the Union's argument would mean a union member who permits his union to be his exclusive representative for bargaining and grievances can then be to the union's wrongful conduct in not processing the grievance is irrelevant because he failed to prosecute the grievance himself. We find no authority for such a proposition and are referred to none. We reject it as spurious legal sophistry.

Question 6

The Union finally argues that the Board's award of damages should not extend past August 8, 1977, the date it filed McCarvel's grievance. It contends it had no obligation to pursue legal action once the grievance committee deadlocked. It further claims the issue of whether the Union should have taken further action once the deadlock was reached was never before the hearing examiner and the Board therefore had no authority to decide it.

In Young v. City of Great Falls, 39 St. R. 1047, 646 P.2d 512 (1982) the court held the Board may find a continuing violation after the filing of an unfair labor practice charge. In that case, as in this, the Board found the same violation after the charge was filed. Although the petitioner in that case could have amended his complaint, because the same charge was in the original complaint, the City could claim no prejudice. Similarly in this case, McCarvel's complai

could have been amended to include the Union's continued failure to process the grievance after it was filed. Because failure to file and process the grievance was the basis for the unfair labor practice charge against the Union, as in Young, we see no prejudice to the Union. This matter appears, based on the discussion of the hearing examiner, to have been fully litigated in the hearings.

Both the NLRB and the courts have required unions to take legal action to enforce the rights of a bargaining unit member. Groves-Granite, and Carpenters Local 2205, 97 LRRM 1164 (1977) and NLRB v. Local 485, IUF(Automotive Plating Corp.), 79 LRRM 2278 (2nd Cir 1972. Though it is recognized the union does not have to take every grievance to arbitration, it clearly cannot arbitrarily refuse to process, or process in a perfunctory manner, a reasonable and meritorious grievance, Vaca v. Sipes. If the grievance committee denies the grievance (Freeman v. Local Union No. 135,746 F.2d 1316 (7th Cir. 1984)), or if the arbitrator's decision is final (Sear v. Cadillac Automobile Co., 501 F. Supp 1350 (D. Mass 1980), 105 LRRM 3366), the union has no duty to seek legal action beyond the procedure provided for in the contract. In these cases the duty of fair representation ends with the arbitrator's or grievance committee's final decision.

The key question in this case then is whether a final binding decision was made within the procedure of the collective bargaining agreement. The agreement required presentation of the grievance to a grievance committee. This committee composed of an equal number of

labor and management representatives deadlocked. Although arbitration was contractually possible if both sides agreed to it, the City refused. The agreement then allowed the union to take either economic recourse or "legal action."

In concluding the grievance committee mechanism set up in the City of Great Falls does not always result in final and binding decisions, the court in Young v. City of Great Falls, supra, affirmed the findings of the Board: "...the grievance procedure provided in the contract does not culminate in a final and binding decision. It may end in a binding decision, if a majority of a six member committee formed by the city manager and comprised of three city and three union representatives can reach agreement. It is clear in this case a deadlocked committee reached no such decision." Thus this case, in which the grievance committee deadlocked, is clearly distinguishable from the cases of Freeman and Sear in which a final decision by the arbitrator or grievance committee relieved the union of further responsibility.

While failure of the Union to pursue legal action upon failure of the process provided in the collective bargaining agreement may in some circumstances be lawful, the hearing examiner questioned the inaction of the Union that eventually resulted in a waiver of McCarvel's rights to get a determination on the merits:

> "The Teamsters also claim that damages should stop at the time the grievance was processed. Had there been a definitive judgment on the merits of the grievance this argument would be more persuasive. However, the Teamsters, again by inaction, cut off the

only avenue remaining open to them to achieve a definitive determination of the merits of the grievance. Had they taken legal action as allowed by the contract that the liability should cease at this point would be persuasive. The damage done to McCarvel started the day he started to work for the City of Great Falls and continued until the day he left the employ. The damages awarded to him should cover this entire period.

"In duty of fair representation cases where the union has failed to process a grievance over a difference in wages, the National Labor Relations Board has determined that the unions backpay liability will cease on the day of the final disposition of the grievance, [Clerks and Checkers Local 1593, International Longshoreman Association] (Strachan Shipping Company) 234 NLRB 98, 98 LRRM 1328 (1978). . . "

In Strachen Shipping Company, (98 LRRM 1331), the NLRB stated

"The uncertainty as to whether Beckham's grievance before the seniority board would have been found meritorious is a direct product of Respondent Union's unlawful action and where, as here, such an uncertainty requires resolution, at least for the purposes of determining monetary responsibility, we deem it only proper to resolve the question in favor of the discriminatee and not the wrongdoer. Accordingly, we shall presume that Beckham's grievance, if processed before the seniority board, would have been found meritorious on or about April 2, 1975, and that on that occasion his position would have been advanced to reflect a position on the seniority referral roster warranted by credit of three additional years of qualifying service.

"Therefore, we direct Respondent Union to treat Beckham as though his position on the seniority referral roster reflected three additional years of qualifying service, and to make Beckham whole for any loss of earnings resulting from the Union's failure to refer him to employment in accordance with such seniority, until such time as all parties, including Beckham, reach an amicable settlement of

> Beckham's seniority claim or the matter is resolved on the merits pursuant to a full utilization of the grievance procedure of the seniority board under the collective bargaining agreement. In the event Beckham's grievance is found to be meritorious, but without any retroactive or contributory payments, or is dismissed on the merits, Respondent Union's backpay liability will cease as of the day of such final disposition of the grievance. See Local Union No. 2088, International Brotherhood of Electrical Workers. AFL-CIO (Federal Electric Corporation). 218 NLRB 396, 89 LRRM 1590 (1975)."

In accordance with Strachen Shipping Company and Groves-Granite we agree with the Board's conclusion that damages began when McCarvel requested the Union handle his grievance in March of 1976 and continued until he resigned his city employment on June 30, 1978. This award properly effectuates the statutory policy of making the grievant whole. We also conclude the monetary damages awarded are within the statutory and case law precedents and that there was no abuse of Board discretion. We therefore affirm the Board's decision awarding McCarvel $7,540.00 and assess interest of $1,262.78 as of August 19, 1985, accured at 10% per annum since December 16, 1983. Interest continues to accrue at this rate as long as the award remains unpaid (25-9-205). Judgment for respondent McCarvel in the amount of $8,802.78 may be entered at this time.

I feel compelled to note in passing that the tenth anniversary of this "grievance" is fast approaching (March, 1986). If the decisions made here are appealed, that anniversary will certainly pass without the grievant realizing any relief. Everyone concerned must share in the responsibility: the legislature, the Union, the

administrative agencies, the attorneys and the courts. A system that permits a ten year delay in a garden variety grievance is no system at all. This case exemplifies the very good reason ordinary people increasingly shun government agencies and courts in favor of alternative, and in many cases less satisfactory, means of dispute resolution.

The decision of the Board is affirmed in its entirety.

Dated this 19th day of August, 1985.

District Judge

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No. 85-515

IN THE SUPREME COURT OF THE STATE OF MONTANA

1986

TEAMSTERS LOCAL NO. 45, affiliated with International Brotherhood of Teamsters, et al.,

Petitioners and Appellants,

-vs-

STATE OF MONTANA, ex rel., BOARD OF PERSONNEL APPEALS AND STUART McCARVEL,

Respondents and Respondents.

APPEAL FROM: District Court of the First Judicial District, In and for the County of Lewis & Clark, The Honorable Gordon Bennett, Judge presiding.

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Submitted on Briefs: May 30, 1986

Decided: August 28, 1986

Filed: AUG 28 1986

Ethel M. Harrison

Clerk

Mr. Justice John C. Sheehy delivered the Opinion of the Court.

The Union appeals from the opinion and order and judgment entered by the District Court of the First Judicial District, Lewis and Clark County, which affirmed the decision of the Board of Personnel Appeals. We affirm.

Stuart McCarvel was a bookmobile driver for Great Falls from 1976 to 1978. He received his first paycheck on March 5, 1976. Although he had worked a 40 hour work week, he was paid at the rate provided in the collective bargaining agreement for bookmobile drivers for only 20 hours. He was paid at the clerical rate which was about $2.00 less per hour for 20 hours. McCarvel went to the Union Hall the same day and sought to file a grievance. Under the terms of the collective bargaining agreement, "a grievance involving wages must be raised within ten (10) calendar days following the event giving rise to such grievance or be forever waived." The Union refused to file a grievance. McCarvel attempted to file grievances again in May, 1976, December, 1976, and February or March, 1977. He was refused at all times. McCarvel tried numerous times to reach the Union's business agent who would not return McCarvel's call. In the course of these proceedings McCarvel learned that ten years earlier the Union and the library worked out an oral side agreement whereby drivers would be paid for 20 hours at the Union driver's rate and 20 hours at the library's nonunion clerical rate.

In February, 1977, McCarvel met with the Union business agent who stated that the Union was preparing for negotiations with the city and that filing a grievance would

"rock the boat." The business agent stated they would try to straighten the matter out during negotiations. Negotiations were unsuccessful and the Union struck the city from July 1 to July 26, 1977. Near the end of the strike the business agent told McCarvel that negotiations would not settle the matter, so the grievance procedure should be used. McCarvel filed an unfair labor practice charge against the Union on August 8, 1977. On the same day, the Union filed McCarvel's grievance. The Union processed the grievance through the grievance committee which was composed of three city members and three Union members. It deadlocked. The Union could then have taken economic or legal action. It did neither and the grievance was waived.

McCarvel pursued his unfair labor practice claim and on November 30, 1978 the hearing examiner entered findings of fact, conclusions of law and a recommended order. The parties had agreed to bifurcate the liability and remedy issues, so the hearing examiner's initial order was limited to the liability issue. She found the Union had failed to fairly represent McCarvel by failing to accept and process his grievance.

On February 22, 1979, the Board of Personnel Appeals affirmed the hearing examiner and ordered an additional hearing to determine remedies. Prior to this hearing, however, the Union filed a motion to dismiss the charges before the Board, claiming the Board had no jurisdiction to decide the case. The Board refused to dismiss the charge and the Union appealed that ruling to the District Court. The District Court held the Board lacked jurisdiction and dismissed the case. The Board appealed to this Court and we reversed. Teamsters Local 45 v. State ex rel. Board of

Personnel Appeals (1981), 195 Mont. 272, 635 P.2d 1310. The District Court remanded the matter to the Board for a hearing on remedies. After that hearing, the examiner entered proposed findings and conclusions and recommended McCarvel be awarded $8,353.17. The Board issued its decision December 16, 1983, adopting the examiner's findings and ordering the Union to pay lesser damages of $7,540.00 in accordance with the apportionment scheme approved in Bowen v. U.S. Postal Service (1983), 459 U.S. 212, 103 S.Ct. 558, 74 L.Ed.2d 402. The Union filed for judicial review on January 16, 1984. Because the prior district court action on this matter involved consideration of the issue of jurisdiction only, the District Court reviewed the Board's unfair labor practice decision as well as the decision on remedies. The District Court affirmed the decision of the Board in its entirety. The Union appeals.

The Union raises five issues for review. First, whether the District Court erred in approving damages for the period of McCarvel's employment prior to February 8, 1977. Second, whether the District Court erred in affirming damages after August 8, 1977. Third, whether the District Court erred in affirming the Board's notice requirement. Fourth, whether the District Court erred in affirming the Board's finding the Local failed to fairly represent McCarvel in handling his claim for overtime pay. Last, whether the District Court erred in affirming the Board's conclusion the "Union's conduct was so unreasonable and arbitrary as to constitute a breach of the duty of fair representation."

We begin with the standard of review governing this appeal. The Board's order is subject to review by a district court pursuant to § 39-31-409, MCA. The order of a district

court is subject to review by this Court pursuant to the same section. The standard of review at both levels is set by § 39-31-105, MCA, which states that the Montana Administrative Procedure Act (MAPA) applies. Section 2-4-704, MCA, sets forth the MAPA standards of review. Specifically, factual findings will be upheld if they are not clearly erroneous, that is if they are supported by substantial evidence on the whole record. In reviewing legal questions, the standard of review is abuse of discretion. City of Billings v. Billings Firefighters (1982), 200 Mont. 421, 651 P.2d 627.

The first issue raised by appellants is whether the District Court erred in approving damages for the period of McCarvel's employment prior to six months before the claim was filed. Section 39-31-404, MCA, states:

> No notice of hearing shall be issued based upon any unfair labor practice more than 6 months before the filing of the charge with the board unless the person aggrieved thereby was prevented from filing the charge by reason of service in the armed forces, in which event the 6-month period shall be computed from the day of his discharge.

This statute does not address damages; it is a statute of limitations for charges based on unfair labor practices. In this case we agree with the District Court that the unfair labor practice was a continuing course of conduct which began on March 5, 1976, when McCarvel received his first paycheck and the Union refused to file a grievance, and continued on until well past the time the unfair labor practice charge was filed in August 1977. Thus the charge was filed within the six month statute of limitations. Once the unfair labor practice is established, the issue of damage arises. The District Court affirmed the award of damages beginning on February 17, 1976 and running until June 30, 1978 which constitutes the entire time McCarvel worked for the city.

The Union argues the back pay should have been limited to six months prior to August 8, 1977 (the date the charge was filed.) The District Court noted the National Labor Relations Board (NLRB) has not taken a consistent position on back pay. At times, it limited back pay to six months prior to the date the charge is filed. Nelson-Hershfield Electronics (1971), 188 NLRB 26, 77 LRRM 1013. In other cases, the court awarded back pay for the entire time the grievant suffered a wage loss due to the Union's failure to process a grievance. IBEW, Local 2088 (Federal Electric Corp.) (1975), 218 NLRB 396, 89 LRRM 1590; Abilene Sheet Metal, Inc. v. NLRB (5th Cir. 1980), 619 F.2d 332. In allowing damages prior to six months before the charge was filed, the District Court held it would be manifestly unfair to the grievant to limit the damages and would reward the Union for its procrastination. We agree that this is a proper case to allow damages beyond the six month limit.

The second issue raised by appellant is whether the District Court erred in affirming damages after the wage grievance was filed on August 8, 1977. The Union argues it processed McCarvel's grievance properly once it was filed, thus it should not be liable for the damages incurred after the grievance was filed.

The District Court affirmed the hearing examiner's findings that the Union by its inaction cut off the only avenue open to them to get a determination of the merits of the grievance. The hearing examiner relied on Clerks and Checkers Local 1593, International Longshoreman Association (1978), 234 NLRB 511, 98 LRRM 1328, and IBEW, Local 2088 (1975), 218 NLRB 396, 89 LRRM 1590, which held that in a duty of fair representation case where the union failed to process

a wage grievance, the union's liability will cease on the day of final disposition of the grievance. The District Court affirmed the Board's award of damages from the time McCarvel began his employment until he left it. We find no abuse of discretion on the part of the District Court.

The third issue raised by the appellant is whether the District Court erred in affirming the Board's notice requirement. The Board ordered the Union to mail this notice to "all employees in the bargaining unit of the City of Great Falls:"

> After a hearing at which both sides had an opportunity to present evidence and state their positions, the Board of Personnel Appeals found that we have violated the Collective Bargaining Act for Public Employees and has ordered us to mail this notice to each member of the bargaining unit.
>
> WE WILL NOT fail or refuse to fairly represent any employees represented by us or arbitrarily fail or refuse to file and process any employee's grievance on a fair basis or refuse to inform employees of the status of their grievance.
>
> WE WILL make Stuart Thomas McCarvel whole for the loss of pay he suffered as a result of our unlawful refusal to consider or process his grievance.
>
> INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 45

The Union argues the order is in excess of the Board's jurisdiction. Section 39-31-406, MCA, gives the Board discretion to "take such affirmative action . . . as will effectuate the policies of this chapter." Posting of notices is more common but the NLRB has required the mailing of notices to all employees. NLRB v. H. W. Elson Bottling Co. (1967), 379 F.2d 223. The District Court held the egregious behavior of the Union in refusing to file the grievance for 17 months justified the Board's remedial order. The District Court went on to state:

> The bargaining unit involved here is a broad, multicraft unit represented by the Public Employees Craft Council. The Union's membership constitutes only a portion of the bargaining unit. Because this unfair labor practice involves only the Teamsters, it is difficult to see how mailing notice of the violation to all members of the bargaining unit will effectuate the policies of the statute. But the choice of the Board will not be disturbed unless it can be shown that the order is a patent attempt to achieve ends other than whose [sic] which can fairly be said to effectuate the policies of the statute. (NLRB v. Electrical Workers, Local 3, ____ F.2d ___, 115 LRRM 3436 (2nd Cir. 1984). No such showing has been made in this case.

The District Court did not abuse its discretion in this finding.

The fourth issue raised by appellant is whether the District Court erred in affirming the Board's finding a failure to fairly represent McCarvel in handling his claim for overtime pay. The Union contends McCarvel failed to provide the business agent with sufficient records of the overtime he worked. However, the record shows McCarvel attempted to supply his time sheet to the Union but the business agent brushed the offer aside saying he believed him. The Union also argues that McCarvel got compensatory time rather than overtime in accordance with library policy. However, the rights of the parties were set forth in the collective bargaining agreement which provided for overtime pay. The library could not unilaterally modify that agreement. The District Court was correct in affirming the Board's order.

The fifth issue raised by appellant is whether the District Court was correct in affirming the Board's conclusion that the Union conduct was so unreasonable and arbitrary as to constitute a breach of the duty of fair representation. A union's duty of fair representation is a

judicially created doctrine first recognized in the context of the Railway Labor Act in Steele v. Louisville & Nashville Railroad Co. (1944), 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173. Steele required the Union to represent its individual members "without hostile discrimination, fairly, impartially and in good faith." Id. at 204, 65 S.Ct. at 232, 89 L.Ed. at 184. The Steele principle was later extended to bargaining representations under the National Labor Relations Act (NLRA). Syres v. Oil Workers International Union, Local 23 (1955), 350 U.S. 892, 76 S.Ct. 152, 100 L.Ed. 785. The NLRB first recognized a breach of the duty of fair representation as an unfair labor practice in Miranda Fuel Co. (1962), 140 NLRB 181, 51 LRRM 1584, reasoning the privilege to act as an exclusive bargaining representative granted in § 9 of the NLRA necessarily gives rise to a corresponding § 7 right in union constituents to fair representation by the exclusive representative. Although the duty of fair representation arose in the context of racial discrimination, the doctrine has been expanded to include arbitrary conduct by a union toward bargaining unit members. In Vaca v. Sipes (1967), 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842, the United States Supreme Court stated the controlling test for breach of the union duty of fair representation: "A breach of the statutory duty of fair representation occurs only when a union's conduct . . . is arbitrary, discriminatory, or in bad faith." Id. at 190, 87 S.Ct. at 916, 17 L.Ed.2d at 857. Thus it is settled under federal labor law and therefore under Montana labor law that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory manner. Id. at 191, 87 S.Ct. at 917, 17 L.Ed.2d at 858.

In her examination of the Union's conduct in this case, the hearing examiner found the only excuses offered McCarvel for the Union's refusal to accept the grievance were: (1) the existence of an oral agreement; (2) the problem would be taken care of at the bargaining table; and, (3) pressing the grievance would upset contract negotiations with the city. These excuses were found "clearly specious" because (1) the oral agreement did not cover overtime and could not be used as an excuse to refuse the grievance, since the right of an employee to the minimum wage provided in the written agreement was an individual right which could not be taken away by an oral agreement between the employer and a union official (Eversole v. La Combe (1951), 125 Mont. 87, 231 P.2d 945); (2) since the contract provided for overtime, failure to award overtime was a contract violation and required no further negotiations; and, (3) negotiations were only part of the Union's duty to its members. Having so found, the hearing examiner concluded the Union's action was arbitrary in that the Union advanced no substantial reason for its failure to accept the grievance, to make a good faith investigation, and to submit the grievance for an organized screening process. Contrary to the Union's assertion, the hearing examiner did not find mere negligence in the Union's handling of the grievance. Recognizing that the business agent's inaction in returning telephone calls could be considered passive and therefore negligent conduct, the hearing examiner emphasized, "However, this inaction combined with his subsequent statements to McCarvel indicate an active, intentional avoidance of accepting the grievance." Even unintentional acts or omission by union officials may be considered arbitrary if

they reflect reckless disregard for the rights of individual employees, if they severely prejudice the injured employee and if the policies underlying the duty of fair representation would not be served in shielding the Union from liability in the particular case. Robesky v. Qantas Empire Airlines Limited (9th Cir. 1978), 573 F.2d 1082, 1088-90. The more meritorious the grievance the more substantial the reason must be to justify abandoning it. Gregg v. Chauffeurs, Teamsters and Helpers Local 150 (9th Cir. 1983), 699 F.2d 1015, 1016. We can think of few issues more meritorious and important to an employee than the issue of pay. The District Court's conclusion that the Union's conduct was so unreasonable and arbitrary as to constitute a breach of the duty of fair representation is firmly supported by the law and the facts.

We affirm the judgment of the District Court.

John C. Sheehy
Justice

We Concur:

J. A. Turnage
Chief Justice

Justices